IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAT INTERNET SERVICES, INC.	)	
	)	Civil Action
v.	)	
	)	No. 00-2135
MAGAZINES.COM INC.	)	

MEMORANDUM

Padova, J. **January , 2001**

The instant action arises out of Defendant Magazines.com's Motion to Dismiss First Amended Complaint or, in the Alternative, for Transfer of Venue. Plaintiff filed a response, and oral argument was held before the Court on October 19, 2000. For the reasons that follow, the Court denies said Motion with respect to the claims for tortious interference with contractual relations and abuse of process, but dismisses the claim for malicious prosecution. The Court also denies the Alternative Motion for Transfer of Venue.

I. BACKGROUND

Plaintiff CAT Internet Services, Inc. ("CAT") is a Pennsylvania corporation with its principal place of business in Pennsylvania. CAT is an Internet and e-commerce company which owns, licenses, and operates web pages at various domains on the Internet. (First Am. Compl. ¶ 1.) Plaintiff owns the rights and interest in the domain name www.magazine.com, which it purchased in August 1999. (Id. ¶ 5.) Subsequent to the acquisition, Plaintiff contacted numerous third party vendors to assess interest in converting the site to market and sell conventional, rather than electronic, magazines. (Id. ¶ 6.)

Defendant Magazines.com is a Delaware corporation with its principal place of business in Murfreesboro, Tennessee. Defendant owns the Internet domain address www.magazines.com, through which it sells conventional magazines and magazine subscriptions. (Id. ¶ 2.)

In December 1999, Plaintiff entered into an agreement with a third party, Magazine Mall, Inc., under which the companies agreed to provide links to Internet domain addresses owned and used by Magazine Mall. (Id. ¶ 8.) In January 2000, CAT entered into a similar agreement with E-News. (Id. ¶ 9.) In addition, CAT began discussions with E-News about other possible deals, including selling the domain name to E-News outright, or creating a co-branded site. (Id. ¶ 12.)

Plaintiff alleges that in January 2000, it discovered that the Defendant was utilizing CAT's domain name to redirect Internet traffic to Defendant's web site. (Id. ¶¶ 14, 18.) Plaintiff allegedly received a phone call from Defendant's attorney inquiring about the relationship between CAT and E-News. (Id. ¶¶ 15-17.) On February 28, 2000, Defendant filed a lawsuit in Tennessee state court against CAT, E-News, Magazine Mall, and another party, seeking to enjoin Plaintiff from using its domain name for on-line sales of magazine subscriptions. (Id. ¶ 20.) Defendant obtained an ex parte temporary restraining order. (Id. ¶¶ 21-23.) The temporary restraining order was eventually dissolved, but Plaintiff alleges that as a result it lost its business with E-News and could potentially lose its business with Magazine Mall. (Id. ¶ 24.)

Plaintiff further alleges that Defendant has continued to spread false information regarding CAT to its actual and prospective business associates. (Id. ¶ 25.) Plaintiff also alleges Defendant "threatened E-News into refusing to engage in business with CAT by offering to discontinue its lawsuit in Tennessee against E-News if E-News would agree never to engage in any business transaction with CAT again." (Id. ¶ 26.)

II. STANDARD

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) only if the plaintiff can prove no set of facts in support of the claim that would entitle him to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true. Id.; see also Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989) ("[the court must] accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the nonmoving party"). However, "conclusory allegations that fail to give a defendant notice of the material elements of a claim are insufficient." McCann v. Catholic Health Initiative, No. Civ. A. 98-1919, 1998 WL 575259, at *1 (E.D. Pa. Sept. 8, 1998).

III. DISCUSSION

A. MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendant claims that Plaintiff's First Amended Complaint fails to state a claim upon which relief can be granted. As a threshold inquiry for each count, the court must first determine which law, Tennessee law or Pennsylvania law, applies to each of the claims asserted. A federal court sitting in a diversity case applies the conflict laws of the state in which it sits. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Here, the Court applies Pennsylvania's choice-of-law rules. LeJeune v. Bliss-Salem, Inc., 85 F.3d 1069, 1071 (3d Cir. 1996). Pennsylvania choice of law analysis consists of two parts. First, the Court examines whether an actual conflict exists. Id. No actual conflict exists where the different laws do not produce different results, and in such a case, courts presume that the law of the forum state applies. Financial Software Systems, Inc. v. First Union National Bank, Civ. Act. No. 99-CV-623, 1999 U.S. Dist. LEXIS 19479, at *8 (E.D. Pa. Dec. 16,

1999). A false conflict exists if only one jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's law. LeJeune, 85 F.3d at 1071. In such a case, the law of the impaired district is applied. Id.

If the Court finds there is an actual conflict, it will apply the law of the state that has the greater interest in having its law applied:

> [The Court must] see what contacts each state has with the accident, the contacts being relevant only if they relate to the "policies and interest underlying the particular issue before the court." When doing this it must be remembered that a mere counting of contacts is not what is involved. The weight of a particular state's contacts must be measured on a qualitative rather than quantitative scale.

LeJeune, 85 F.3d at 1072 (citing Cipolla v. Shaposka, 267 A.2d 854, 856 (1970)). Courts may consider such issues as the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation and place of business of the parties; and the place where the relationship, if any, between the parties is centered. Petrokehagias v. Sky Climber, Inc., Civil Action Nos. 96-CV-6965, 97-CV-3889, 1998 U.S. Dist. LEXIS 6746, at *10-11 (E.D. Pa. May 4, 1998).

The Court must conduct the conflicts analysis with each particular issue presented, such that different law may apply to different causes of action. Financial Software Systems, Inc., 1999 U.S. Dist. LEXIS 19479, at *8. Plaintiff's First Amended Complaint brings three counts: (I) tortious interference with actual and prospective contractual relations; (II) abuse of process; and (III) wrongful use of civil proceedings/malicious prosecution. The Court will consider each count in turn.

1. Count I: Interference with Contractual Relations

Count I alleges tortious interference with both actual and prospective contractual relations. For the purposes of conflicts analysis, the Court will examine each of these causes of action

separately. First, the Court will consider prospective contractual relations.

a. Interference with prospective contractual relations:

Plaintiff's prospective contractual relations claim presents an actual conflict between the laws of the two states. Tennessee does not recognize a cause of action for tortious interference with prospective contractual relations. See Nelson v. Martin, 958 S.W.2d 643, 646 (Tenn. 1997) ("claim of interference with a prospective economic advantage does not state a cause of action under the law of Tennessee.") Pennsylvania does recognize a cause of action for tortious interference with prospective contractual relations. See Glenn v. Point Park College, 272 A.2d 895, 897 (Pa. 1971). Furthermore, the interests of both states are invoked. The Tennessee Supreme Court has chosen not to recognize this tort for two reasons: first, prospective contracts do not involve agreements to be bound, and therefore interference with them does not threaten the integrity of contracting; and second, recognition of the tort would have the tendency to hinder market efficiency. Nelson, 958 S.W.2d at 646. Here, the Defendant would benefit from the Tennessee rule. Pennsylvania, on the other hand, recognizes the tort of interference with prospective contractual relations for the same reasons it recognizes the tort of interference with actual contractual relations; that is, to create predictability and confidence in contracting. Glenn, 272 A.2d at 897 ("We see no reason whatever why an intentional interference with a prospective business relationship which results in economic loss is not as actionable as where the relation is presently existing . . .") Entities contemplating entering into a contract benefit from the Pennsylvania rule.

Having found that a conflict does exist, the Court must next examine which state has the greater interest in having its rule applied, by considering: the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of

incorporation and place of business of the parties; and the place where the relationship, if any, between the parties is centered. Petrokehagias, 1998 U.S. Dist. LEXIS 6746, at *10-11.

Here, neither state has a monopoly on such interests; however, Pennsylvania has the more significant contacts for purposes of this tort claim. The alleged injury here is damage to Plaintiff's prospective business relationships. When the injury sustained is of a pecuniary nature, the plaintiff's principal place of business is generally considered the place of injury and represents a contact of substantial significance. Bedi Photographic Corp. v. Polaroid Corp., Civ. Act. Nos. 76-53, 76-1107, 76-3130, 76-3522, 76-3771, 1980 U.S. Dist. LEXIS 15629, at *24 (E.D. Pa. Aug. 11, 1980) (citing Restatement (Second) Conflict of Law § 148, cmt i). In this case, the alleged harm to business relationships is centered in Pennsylvania, which is the state of incorporation and the principal place of business of the Plaintiff, and this is a contact of substantial significance. Though Tennessee also has an interest in having its law applied, by virtue of its being the location of the underlying lawsuit, its contacts are not sufficient to outweigh Pennsylvania's interest in the context of this cause of action. The alleged harm here is precisely that envisioned by Pennsylvania law, and Pennsylvania law should apply.

Furthermore, the Plaintiff has stated the elements of a claim of tortious interference with prospective contractual relations. To state such a claim, the Plaintiff must set forth the following elements: (1) existence of a prospective contractual relation; (2) purpose or intent by defendant to harm plaintiff by preventing the relationship from occurring; (3) absence of privilege or justification on the part of the actor (appellee); and (4) the occurrence of actual harm or damage to plaintiff as a result of the actor's conduct. Glen v. Point Park College, 272 A.2d 895, 898 (Pa. 1971). Plaintiff has alleged these elements. Specifically, Plaintiff has pled the existence of a prospective contractual

relation between Plaintiff and E-News, Magazine Mall, and other parties (First Am. Compl. ¶ 12), intent by the Defendant to harm the Plaintiff by preventing these relationships from occurring in the absence of a privilege or justification (Id. ¶ 29-31), and the occurrence of $100,000 in damages to the Plaintiff as a result (Id. ¶ 32). Defendant's motion to dismiss this claim therefore must be denied.

b. Interference with Actual Contractual Relations

Both Tennessee and Pennsylvania recognize the tort of intentional interference with contractual relations. See Shiner v. Moriarty, 706 A.2d 1228, 1238 (Pa. Super. Ct. 1998); Dynamic Motel Mgmt., Inc. v. Erwin, 528 S.W.2d 819, 822 (Tenn. Ct. App. 1975). The basic rules in Tennessee and Pennsylvania with respect to the tort for intentional interference with actual contractual relations are virtually identical.[1] Defendant contends, however, that there may be a conflict with respect to the scope of the judicial privilege as it relates to the filing of the lawsuit. Both Tennessee and Pennsylvania recognize a privilege covering statements and communications made in the course of judicial proceedings. Myers v. Pickering Firm, Inc., 959 S.W.2d 152, 159 (Tenn. Ct. App. 1997); Post v. Mendel, 507 A.2d 351, 354-55 (Pa. 1986). However, courts in the two

[1]Under Tennessee law, the elements of the claim of are: (1) existence of a legal contract; (2) wrongdoer had knowledge of the existence of the contract; (3) intention to induce breach of contract; (4) wrongdoer acted maliciously; (5) breach of the contract; and (6) act complained of was proximate cause of the breach. Dynamic Motel Management, Inc., 528 S.W.2d at 822. Under Pennsylvania law, the elements of the claim are: (1) existence of contract; (2) purposeful action by the defendant specifically intended to harm the existing relation; (3) absence of privilege or justification on the part of the defendant; and (4) occasioning of actual legal damage as a result of defendant's conduct. Shiner, 706 A.2d at 1238.

Tennessee's malice requirement and Pennsylvania's no privilege requirement are functionally equivalent. Malice in this context is the willful violation of a known right. Edwards v. Travelers Ins. of Hartford, 563 F.2d 105, 121 (6th Cir. 1977); Dynamic Motel Management, Inc., 528 S.W.2d at 822. Generally, an intentional commission of a harmful act without a justifiable cause is deemed the equivalent of legal malice. In re AM Int'l, Inc., 46 B.R. 566, 575 (Bankr. M.D. Tenn. 1985).

states have not ruled as to whether the privilege covers the actual filing of a false lawsuit.[2] The Third Circuit Court of Appeals has predicted that the Pennsylvania Supreme Court would refuse to extend the privilege to cover an allegedly improperly filed suit. Silver v. Mendel, 894 F.2d 598, 603 (3d Cir. 1990).

With respect to how the Tennessee courts would interpret the scope of the judicial privilege in the context of this claim, this Court need not make an predictions, because Pennsylvania law would apply regardless of which rule the Tennessee courts might adopt. In the event that the Court were to predict that Tennessee law is the same as Pennsylvania law, Pennsylvania law would apply as the law of the forum. Financial Software Systems, Inc., 1999 U.S. Dist. LEXIS 19479, at *8. In the event that Tennessee law were to differ from Pennsylvania law, Pennsylvania law would still apply, as the law of the state with the greater interest in having its law applied. Just as the Court concludes that Pennsylvania has a greater interest in having its law applied in the context of a claim of interference with prospective contractual relations, so too would Pennsylvania have greater interest in having its law applied in the context of a claim of interference with actual contractual relations.

Furthermore, Plaintiff has stated a claim for tortious interference with actual contractual relations. To state such a claim, a plaintiff must allege: (1) existence of contract; (2) purposeful action by the defendant specifically intended to harm the existing relation; (3) absence of privilege or justification on the part of the defendant; and (4) occasioning of actual legal damage as a result of defendant's conduct. Shiner, 706 A.2d at 1238. Plaintiff has alleged each of these elements in its

[2]Neither Myers nor Lann v. Third Nat'l Bank, 277 S.W.2d 439, 440 (Tenn. 1955), cited by the Defendant, involve the question of whether the act of filing a false lawsuit is covered by the judicial privilege rule.

Amended Complaint. Specifically, Plaintiff has alleged the existence of actual contracts with Magazine Mall and E-News (First Am. Compl. ¶¶ 8-9), purposeful actions by the Defendant to interfere with these contracts (Id. ¶¶ 20-21, 23-26), the absence of justification for those actions (Id. ¶ 31), and actual damages in excess of $100,000 (Id. ¶ 32). Therefore, the Court denies Defendant's Motion to Dismiss the claim of interference with actual contractual relations.

The Court does note that the judicial privilege does have an effect on Plaintiff's interference claims, however, and that effect is to preclude any allegations that stem from any statements made in the Tennessee lawsuit or in obtaining the temporary restraining order, as these statements are covered by the absolute privilege. Post, 507 A.2d at 355. Count I of the First Amended Complaint may proceed with respect to the actual filing of the lawsuit, Silver, 894 F.2d at 603, and any other statements and actions not within the course of the judicial proceedings.

2. Count II: Abuse of Process

Both Tennessee and Pennsylvania recognize substantially similar versions of the tort of abuse of process. See Bell v. Icard, 986 S.W.2d 550, 555 (Tenn. 1999); Shiner, 706 A.2d at 1236. Because the laws would produce the same result, the court presumes that Pennsylvania law applies. See Financial Software Systems, Inc., 1999 U.S. Dist. LEXIS 19479, at *8.

To state a claim for abuse of process claim, a plaintiff must plead the following three elements: (1) use of legal process by defendant against the plaintiff; (2) primary purpose of the use of process was not that for which process was designed; and (3) actual harm caused to plaintiff. Shiner, 706 A.2d at 1236. The plaintiff must show some definite act or threat that was not authorized by the process, or aimed at an objective not legitimate in the use of the process. Rosen v. Tesoro Petroleum Corp., 582 A.2d 27, 32 (Pa. Super. Ct. 1990); Williams, 69 F. Supp. 2d at 673. There is

no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. Cameron v. Graphic Management Assoc., Inc., 817 F. Supp. 19, 21 (E.D. Pa. 1992); DiSante v. Russ Financial Co., 380 A.2d 439, 441 (Pa. Super. Ct. 1977).

Plaintiff alleges the following in support of its abuse of process claim: (1) wrongful application for an ex parte temporary restraining order; (2) wrongful misrepresentations to the Tennessee court during the course of litigation; and (3) wrongful use of the lawsuit and temporary restraining order to threaten a third party into refusing to do business with the Plaintiff. (First Am. Compl. ¶ 26). The first two of these allegations fail to support a claim for abuse of process. The filing of the temporary restraining order, even with an improper motive, is not abuse of process. See Cameron, 817 F. Supp. at 21. As for the misstatements to the Tennessee court, these are covered by the judicial privilege, which is absolute. Post, 507 A.2d at 355.

With respect to the third allegation, the Court concludes that, at this stage, the allegation is sufficient to state a claim. Plaintiff alleges that Defendant used the lawsuit "to threaten E-News into refusing to engage in business with CAT." (First Am. Compl. ¶ 26.) Accepting the allegation and all reasonable inferences that can be drawn from it as true, and viewing the allegation and these inferences in the light most favorable to the Plaintiff, the Court must view the allegations as an improper threat, rather than simply as part of legitimate settlement discussions. Use of the lawsuit as a threat in this way and under these circumstances would constitute the use of a legal proceeding for an improper purpose, and such that it causes damage to the plaintiff. This states a claim for abuse of process, and for this reason, the Court denies Defendant's motion to dismiss the abuse of process claim.

3. Count III: Malicious Prosecution

Both Tennessee and Pennsylvania recognize the tort of malicious prosecution, and the elements of the cause of action are the same under both states' laws. See Bell v. Icard, 986 S.W.2d 550, 555 (Tenn. 1999); In re Larsen, 616 A.2d 529, 587 (Pa. 1992). To state such a claim, the plaintiff must plead three elements: (1) defendant lacked probable cause to bring the action against plaintiff, or was grossly negligent in doing so; (2) defendant acted with malice toward plaintiff; and (3) the proceeding terminated in favor of the plaintiff. 42 Pa. Cons. Stat. Ann. §§ 8351; In re Larsen, 616 A.2d at 587.

The Defendant contends that Plaintiff has failed to plead the third element – termination of the proceeding in favor of the plaintiff – because the appeal of the underlying action is still pending. The Court agrees. Neither the Tennessee nor the Pennsylvania courts have addressed the issue of the effect of an appeal on a "final" termination,[3] but the Court concludes that the better rule is that there is no final termination while an appeal is pending. This is the view adopted by the Restatement and by the majority of jurisdictions deciding this issue. Restatement (Second) of Torts § 672 cmt. j; Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 208 (Tx. 1996) (requiring exhaustion of all appeals avenues prior to bringing malicious prosecution claim); Barrett Mobile Home Transp. Inc. v.

[3]Defendant contends that the Tennessee Supreme Court resolved this issue in Christian v. Lapidus, 833 S.W.2d 71 (Tenn. 1992), by adopting comment j to the Restatement (Second) of Torts § 674. The Court disagrees. Comment j states that, "If an appeal is taken, the proceedings are not terminated until the final disposition of the appeal and of any further proceedings that it may entail." Restatement (Second) of Torts § 674 cmt. j. The court in that case held that abandonment of a civil claim could constitute a final determination for purposes of a malicious prosecution action. It did not adopt the Restatement comment in its entirety, but rather cited it for the proposition that "abandonment or withdrawal of an allegedly malicious prosecution is sufficient to establish a final and favorable termination so long as such abandonment or withdrawal was not accompanied by a compromise or settlement" Christian, 833 S.W.2d at 74.

McGugin, 530 So.2d 730, 734 (Ala. 1988); but see McCammon v. Oldaker, 516 S.E.2d 38, 43-44 (W. Va. 1999) (statute of limitations for malicious prosecution runs from initial judgment and is not tolled by appeal); Levering v. National Bank, 100 N.E. 322, 323 (Ohio 1912). In the Court's view, it would be unfair for the Defendant under these circumstances to be forced to defend against a malicious prosecution action while the appeal is pending and there is no final termination. The Court therefore dismisses the malicious prosecution claim without prejudice.

B. MOTION TO TRANSFER TO TENNESSEE

In the alternative to dismissal, the Defendant asks the Court to transfer this case to the United States District Court for the Middle District of Tennessee for convenience of the parties. The transfer statute provides, in pertinent part:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C.A. §1404(a) (West 1993). In Jumara v. State Farm Ins. Co., 55 F.3d 873, 879-80 (3d Cir. 1995), the United States Court of Appeals for the Third Circuit has enumerated the following private and public interests that the Court may consider in deciding whether to grant a motion to transfer:

> The private interests [include]: . . . the defendant's preference; whether the claim arose elsewhere; the convenience of the parties as indicated by their relative physical and financial condition; the convenience of the witnesses – but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and the location of the books and records (similarly limited to the extent that the files could not be produced in the alternative forum).
>
> The public interests [include]: the enforceability of the judgment; practical considerations that could make the trial easy, expeditious, or inexpensive; the relative administrative difficulty in the two fora resulting from Court congestion; the local interest in deciding local controversies at home; and the familiarity of the trial judge with the applicable state law in diversity cases.

Id. (citations and internal quotations omitted). The burden of establishing the propriety of transfer rests with the movant. Id. at 879. Plaintiff's choice of forum is entitled to substantial deference, and "should not be lightly disturbed." Id. The plaintiff's choice should prevail, unless the balance of convenience of the parties is strongly in favor of the defendant. Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970). The defendant must meet a fairly heavy burden with respect to forum transfer.

The Court concludes that the Defendant here has not met its burden of demonstrating that a transfer is warranted. The factor weighing most heavily in favor of transfer is the contention that all or most of the alleged acts relevant to the matter occurred in the Middle District of Tennessee. See Jumara, 55 F.3d at 879-80. This would include the filing of the lawsuit and the temporary restraining order, as well as any communications by the Defendant to third parties. The location of where the claim arose is a relevant factor in considering forum transfer.

This factor alone, however, is insufficient to outweigh the Plaintiff's choice of a Pennsylvania forum for this suit. That the actions occurred in Tennessee does not negate that the effects of those actions were felt, and indeed were centered, in Pennsylvania. Furthermore, Pennsylvania law will apply to the tortious interference claims and to the abuse of process claim. That Pennsylvania law will be applied weighs against forum transfer. See id.

Neither is Defendant's contention that a trial in Tennessee will be more convenient for a majority of witnesses sufficient to warrant transfer. First, the convenience of transfer would disproportionately favor Defendant's witnesses, whereas Plaintiff's witnesses would likely benefit from a trial located in Pennsylvania. Courts will not transfer venue of an action when the transfer would serve merely to shift the burden of inconvenience from the defendant to the plaintiff. See B.J.

McAdams, Inc. v. Boggs, 426 F. Supp. 1091, 1105 (E.D. Pa. 1977). Second, inconvenience to the witnesses is only relevant to the extent that the witnesses may actually be unavailable for trial in one of the fora. Jumara, 55 F.3d at 879. Defendant has not made any showing with respect to such unavailability should the action not be transferred.

At best, a consideration of these factors suggests that the convenience inquiry is a close call. The Court cannot conclude that the balance of convenience of the parties is strongly in favor of the Defendant. Thus, the plaintiff's choice of forum must prevail. See Shutte, 431 F.2d at 25. For the reasons stated, the Court denies the Defendant's request for transfer of venue pursuant to 28 U.S.C. §1404(a).

An appropriate Order follows.

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O R D E R

AND NOW, this day of January, 2001, upon consideration of Defendant Magazines.com's Motion to Dismiss First Amended Complaint or, in the Alternative, for Transfer of Venue (Docket No. 8), and any responses thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in part and **DENIED** in part. In furtherance thereof, if is specifically **ORDERED** that:

1. Counts I and II of the First Amended Complaint may proceed.

2. Count III is **DISMISSED** without prejudice.

3. Defendant's Alternative Motion for Transfer of Venue is **DENIED.**

BY THE COURT:

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John R. Padova, J.